

Author: L Steyn

**SINK OR SWIM? DEBT REVIEW'S AMBIVALENT "LIFELINE" — A SECOND
SEQUEL TO "... A TALE OF TWO JUDGMENTS" *NEDBANK v ANDREWS* (240/2011) 2011 ZACPEHC
29 (10 May 2011); *FIRSTRAND BANK LTD v EVANS* 2011 4 SA 597 (KZD) AND *FIRSTRAND BANK LTD
v JANSE VAN RENSBURG* 2012 2 All SA 186 (ECP)**

ISSN 1727-3781



2012 VOLUME 15 No 4

<http://dx.doi.org/10.4314/pelj.v15i4.6>

SINK OR SWIM? DEBT REVIEW'S AMBIVALENT "LIFELINE" — A SECOND SEQUEL TO "... A TALE OF TWO JUDGMENTS"

**NEDBANK v ANDREWS (240/2011) 2011 ZAECPEHC 29 (10 May 2011);
FIRSTRAND BANK LTD v EVANS 2011 4 SA 597 (KZD) AND FIRSTRAND BANK
LTD v JANSE VAN RENSBURG 2012 2 All SA 186 (ECP)**

L Steyn*

1 Introduction

The relationship between the *National Credit Act* 34 of 2005¹ and the *Insolvency Act* 24 of 1936² has been the subject of discussion in three academic pieces published in successive volumes of this journal in the last three years.³ These concerned the judgments in *Ex parte Ford and Two Similar Cases*,⁴ *Investec Bank Ltd v Mutemeri*⁵ and *Naidoo v ABSA Bank Ltd*.⁶ Since then, the interaction between statutory provisions relating to debt review in terms of the NCA and sequestration in terms of the *Insolvency Act* has demanded the attention of the high court in at least three more judgments. These are *Nedbank v Andrews*,⁷ *FirstRand Bank Ltd v Evans*⁸ and, most recently, *FirstRand Bank Ltd v Janse van Rensburg*.⁹

The question raised in all three of the recent cases was whether or not a debtor's application for debt review in terms of the NCA constitutes an "act of insolvency" in

* Lienne Steyn. BA LLB (UN) LLM (Unisa) LLD (UP). Associate Professor, School of Law, University of KwaZulu-Natal (steyn@ukzn.ac.za). Portions of the text of this case analysis have been reproduced from the author's LLD-thesis manuscript. See Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* (LLD – thesis UP 2012).

1 Hereafter referred to as the "NCA".

2 Hereafter referred to as the "*Insolvency Act*".

3 See Van Heerden and Boraine 2009 *PELJ* 22; Boraine and Van Heerden 2010 *PELJ* 84; and Maghembe 2011 *PELJ* 171.

4 *Ex parte Ford and Two Similar Cases* 2009 3 SA 376 (WCC), hereafter referred to as "*Ex parte Ford*".

5 *Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ), hereafter referred to as "*Investec v Mutemeri*".

6 *Naidoo v ABSA Bank Ltd* 2010 4 SA 597 (SCA), hereafter referred to as "*Naidoo v ABSA*".

7 *Nedbank v Andrews* (240/2011) 2011 ZAECPEHC 29 (10 May 2011), hereafter referred to as "*Nedbank v Andrews*".

8 *FirstRand Bank Ltd v Evans* 2011 4 597 (KZD), hereafter referred to as "*FirstRand Bank Ltd v Evans*".

9 *FirstRand Bank Ltd v Janse van Rensburg* 2012 2 All SA 186 (ECP), hereafter referred to as "*FirstRand Bank v Janse van Rensburg*".

terms of section 8 of the *Insolvency Act*, upon which a creditor may rely in an application for the compulsory sequestration of the debtor's estate. If it does, it would mean that by resorting to the debt relief measures provided by the NCA a debtor commits the very act on which a creditor may base an application for a sequestration order that, if granted, will render his estate insolvent and bring about the liquidation of his assets. From the debtor's perspective, this is most probably precisely the situation that he endeavours to avert by applying for debt review. Further, sequestration would frustrate the stated purpose of the NCA, which is that debtors should take responsibility for their debts by satisfying them in full¹⁰ and concurrent creditors might ultimately receive a dividend that falls far short of what they are due. The debt relief measures introduced by the NCA may be regarded, in a sense, as posing alternatives to sequestration in terms of the *Insolvency Act*. The question may be raised whether a debtor's reaching out to the NCA's "lifeline" may, or should, be the very act that triggers his estate's sequestration and its attendant consequences.

In each set of circumstances in *Nedbank v Andrews*, *FirstRand Bank v Evans* and *FirstRand Bank v Janse van Rensburg*, the court dealt with the issue somewhat differently. It is submitted that this is an important issue, the treatment of which impacts significantly on the efficacy of the South African consumer debt relief system and which therefore merits further discussion.

2 Background

The sequence of developments began with *Ex parte Ford*, in which the court refused applications by three debtors for the voluntary surrender of their estates. The reason that the applications were dismissed was that the court regarded an application for debt review in terms of the NCA as the more appropriate route for each over-indebted debtor to follow. Van Heerden and Boraïne, in an article entitled "The interaction between the debt relief measures in the *National Credit Act* 34 of 2005 and aspects of insolvency law",¹¹ provided an insightful and comprehensive analysis of the position in relation to the consumer debt relief measures provided by the NCA and their interaction with the provisions of the *Insolvency Act*. While the primary

¹⁰ See s 3 NCA.

¹¹ Van Heerden and Boraïne 2009 *PELJ* 22.

focus in *Ex parte Ford* was the voluntary surrender procedure, Van Heerden and Boraine extended their discussion to the implications of the provisions of the NCA for compulsory sequestration applications and, almost prophetically, they anticipated what later occurred and was decided in *Investec v Mutemeri*, reported the following year. It may be noted at this juncture that Van Heerden and Boraine considered that:¹²

a notice to a creditor that a consumer-debtor is bound to go for debt review may also amount to an act of insolvency, although the mere commission of an act of insolvency is not in itself sufficient to warrant the granting of a compulsory sequestration order.

In *Investec v Mutemeri*, the high court held that an application for compulsory sequestration in terms of the *Insolvency Act* did not constitute "enforcement" of an agreement, as envisaged by sections 129 and 130 of the NCA. It held that it also did not constitute the "exercise or enforcement by litigation or other judicial process [of] any right or security" from which the creditor is barred once it has been notified, in terms of section 86(4)(b)(i) of the NCA, that the debtor has applied for debt review. Essentially, the effect of the decision is that, where a debtor has applied for debt review in terms of the NCA, this does not preclude a creditor from applying for the sequestration of the debtor's estate. Boraine and Van Heerden promptly followed up their initial article with a discussion of the position in the light of the decision in *Investec v Mutemeri*, in a second article entitled "To sequester or not to sequester in view of the National Credit Act 34 of 2005: a tale of two judgments".¹³ The authors agreed with the reasoning behind the decision and the correctness in principle of the conclusion reached by the court that an application for sequestration does not amount to "a civil procedure or civil suit in the form of debt enforcement".¹⁴

As they had done in their earlier article in relation to *Ex parte Ford*, Boraine and Van Heerden extrapolated from the facts in *Investec v Mutemeri* and, observing that "a debt situation is ... not static", they explored ways in which the established precedent ought to be applied and the approach that ought to be adopted in various

12 Van Heerden and Boraine 2009 *PELJ* 42 fn 78.

13 Boraine and Van Heerden 2010 *PELJ* 84.

14 Boraine and Van Heerden 2010 *PELJ* 116-117.

scenarios.¹⁵ They suggested that in appropriate circumstances the court might consider referring the matter for debt review, using the discretion afforded to it by section 85 of the NCA, before it exercised its discretion to grant a sequestration order in terms of the *Insolvency Act*. The authors anticipated that this might be an appropriate course for a court to adopt in an application for voluntary surrender in circumstances where it appeared that credit had been extended recklessly. They suggested that this could occur even where the applicant debtor had already undergone debt review, but where it transpired that the latter process had been defective in that, for example, the question of reckless lending had not been properly considered.¹⁶

Boraine and Van Heerden further envisaged that a creditor might seek the sequestration of the estate of a debtor whose obligations arose mainly out of credit agreements and who had already undergone the debt review process. This might be the case where the creditor had rejected repayment terms proposed by the debtor, so that a "stale-mate" situation had arisen, or where an application lodged by the debt counsellor to the court was still pending, or even where the court had issued a debt restructuring order¹⁷ despite the creditor's opposition. The authors considered that in such circumstances there might be "hard facts" available on which the creditor could base its argument that sequestration of the debtor's estate would be preferable. These might include a situation where the creditor was able to show that the repayment period or the monthly repayment amount, according to the restructuring order, was not viable. It might also arise where the debtor had not included in the debt review all of his obligations arising out of credit agreements or where the debtor had stopped making payments after the issue of the court's debt rescheduling order or the filing of the voluntary rescheduling agreement between the parties.¹⁸

15 Boraine and Van Heerden 2010 *PELJ* 117-120.

16 Boraine and Van Heerden 2010 *PELJ* 119.

17 The terms "debt restructuring", "debt re-arrangement" and "debt rescheduling" are used interchangeably in this work, as are the terms "restructure", "re-arrange" and "reschedule". The words "re-arrange" and "re-arrangement" are spelt thus in order to conform to the spelling employed in the NCA.

18 Boraine and Van Heerden 2010 *PELJ* 120.

In *Naidoo v ABSA*, the Supreme Court of Appeal confirmed the correctness of the decision, in *Investec v Mutemeri*, that sequestration does not amount to legal proceedings to enforce an agreement, as envisaged by section 129 read with section 130(3) of the NCA. The effect of the decision in *Naidoo v ABSA* is that, in an application by a creditor for the sequestration of a debtor's estate, the former is not required first to have issued a notice in terms of section 129(1)(a) of the NCA to the debtor. In a case analysis of *Naidoo v ABSA* entitled "The Appellate Division has spoken ..."¹⁹ Maghembe agreed with the decision but expressed concern that the effect of sequestration to deprive a consumer debtor of the option of continuing with the debt review might impact adversely on "the efficiency of the NCA".²⁰ Maghembe observed that through debt restructuring or a ruling in respect of reckless credit, or even simple negotiation between the parties, a debtor might be in a position to overcome his debt burden and to satisfy his financial obligations in full, which, as he pointed out, is one of the stated purposes of the NCA. What is more, a debtor could avoid a declaration of insolvency with the consequent loss of assets, the social stigma attached to the insolvency, and the fact of being rendered "a less than useful member of society". Maghembe submitted that a debtor should have the choice between insolvency and an alternative debt relief measure.²¹ He suggested that sections 88 and 129 of the NCA should be amended to preclude a creditor from applying for the compulsory sequestration of a debtor's estate after it has received a notice informing it that the debtor has applied for debt review in terms of section 86(4)(b)(i), or that a matter has been referred by a court for debt review under section 83 or 85 of the NCA, or without first having issued a section 129 notice to the debtor.²²

The more recent judgments in *Nedbank v Andrews*, *FirstRand Bank v Evans* and *FirstRand Bank v Janse van Rensburg* concerned whether or not any of the various acts committed in an application for debt review, a debtor's notification to creditors that he has applied for debt review, the re-arrangement of a debtor's obligations, or the issue of a debt re-arrangement order in terms of the NCA, constitutes an "act of insolvency" in terms of section 8 of the *Insolvency Act*. These judgments and their

19 Maghembe 2011 *PELJ* 171.

20 Maghembe 2011 *PELJ* 177-178.

21 Maghembe 2011 *PELJ* 178.

22 Maghembe 2011 *PELJ* 178-179.

general implications for the efficacy of consumer debt relief measures that are available in South Africa are considered below.

3 Nedbank v Andrews

In *Nedbank v Andrews* it was common cause that Andrews was indebted to Nedbank in the amounts of R972 065.37 in respect of a loan agreement, R168 418.38 in respect of a suretyship agreement, R39 391.40 in respect of a credit card facility, and R8 125.63 in respect of an overdraft facility on his current account. These obligations had been re-arranged in terms of section 87 of the NCA.²³ Nedbank initially brought applications for the sequestration of the estates of both Andrews and his wife, to whom he was married out of community of property.²⁴ However, Nedbank later withdrew the application against his wife. Andrews opposed the application for the sequestration of his estate.²⁵

In its founding papers Nedbank sought to rely on three grounds for the sequestration of Andrews' estate. These were: an alleged act of insolvency in terms of section 8(g) of the *Insolvency Act*,²⁶ an alleged act of insolvency in terms of section 8(e) of the *Insolvency Act*,²⁷ and an allegation of his actual insolvency in that his liabilities, fairly estimated, exceeded the value of his assets.²⁸ However, in court, counsel for the applicant withdrew the allegations of the commission of the acts of insolvency and sought to rely solely on the actual insolvency of Andrews. In its judgment, the court, *per* Neppgen J, nevertheless considered it necessary to refer to the alleged acts of insolvency in the context of the allegations of actual insolvency put forward on behalf of the applicant.²⁹ Nedbank had initially contended that Andrews had committed an act of insolvency in terms of section 8(g) of the *Insolvency Act* in that by applying for

23 *Nedbank v Andrews* para 2.

24 It may be noted that Andrews and his wife were jointly and severally liable for repayment of the amount of R972 065.37 in respect of the loan agreement.

25 *Nedbank v Andrews* para 1.

26 In terms of s 8(g) of the *Insolvency Act*, "[a] debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts".

27 In terms of s 8(e) of the *Insolvency Act*, "[a] debtor commits an act of insolvency if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts".

28 *Nedbank v Andrews* para 10, with reference to *Ohlsson's Cape Breweries Ltd v Totten* 1911 TPD 48 50.

29 *Nedbank v Andrews* para 3.

and being placed under debt review he gave notice in writing to the applicant and other creditors that he was unable to pay his debts. It had contended further that the re-arrangement of his debts, which occurred in the debt review process, constituted an act of insolvency envisaged in section 8(e) of the *Insolvency Act*.³⁰

Andrews had responded to the allegations contained in the founding papers by contending that Nedbank was not entitled to rely on the proceedings conducted in terms of the NCA as constituting acts of insolvency for the purposes of the *Insolvency Act*. Andrews also raised the point that Nedbank had participated in the debt review and that it had unsuccessfully applied for the rescission of the debt re-arrangement order. However, in view of the fact that Nedbank had withdrawn its allegations of the commission of acts of insolvency and was relying solely on the actual insolvency of Andrews, the court did not deal in more detail with the issues raised by Andrews in this regard.³¹ As far as the allegation of actual insolvency was concerned, the court found that Nedbank had not established that Andrews' liabilities exceeded his assets and it dismissed the application for sequestration of his estate.³²

4 FirstRand Bank v Evans

4.1 The facts and the issues

FirstRand Bank v Evans concerned an application for the provisional sequestration of the estate of Evans. The bank alleged that he was indebted to it in an amount in excess of R2 million obtained as a loan secured by two mortgage bonds passed over his home as well as an amount in the region of R800 000 obtained as a commercial loan secured by a mortgage bond passed over another immovable property, a sectional title unit. FirstRand Bank relied on the commission by Evans of an act of insolvency in terms of section 8(g) of the *Insolvency Act* by giving written notice of an inability to pay his debts and, alternatively, that he was actually insolvent. According to the judgment, on 29 January 2009, Evans had applied for debt review in terms of

30 *Nedbank v Andrews* para 4.

31 *Nedbank v Andrews* para 5.

32 *Nedbank v Andrews* paras 10-11.

section 86 of the NCA and the bank had been advised of this.³³ On 17 April 2009 he had addressed a letter to the bank informing it that: its records should show that he was under debt review; the mortgage bond repayment was being renegotiated and would be administered through the courts; and he was terminating the debit order against his bank account for the monthly instalment in respect of the commercial loan. The bank relied on this letter as constituting the alleged act of insolvency.

On 18 May 2009 FirstRand Bank issued notice that it was terminating the debt review in terms of section 86(10) of the NCA.³⁴ On 16 July 2009 it issued summons against Evans for payment of an amount slightly in excess of R2 million, which was secured by the two mortgage bonds passed over his home. On 18 August 2009 the bank obtained default judgment and, presumably, an order declaring executable his immovable property.³⁵ Evans first heard of this when on 12 March 2010 the sheriff served a notice of attachment at his residence informing him that a sale in execution of his home would take place on 28 May 2010.³⁶ It transpired that the summons had been served at the incorrect address. On 8 April 2010 the bank initiated the application for the sequestration of Evans' estate based on both the judgment and an alleged amount of R841 940 owing at that point in time in respect of their loan agreement. The sequestration application made no mention of the attachment order or the sale in execution.³⁷

Evans opposed the application for the sequestration of his estate. He furnished the following information to the court. An application for the re-arrangement of his debt had been issued in the Durban Magistrate's Court on 3 July 2009 and an order was made on 24 July 2009.³⁸ He provided details of regular monthly payments from 28

33 *FirstRand Bank Ltd v Evans* para 3.

34 It should be borne in mind that this occurred prior to the decision of the Supreme Court of Appeal in *Collett v FirstRand Bank Ltd and Another* 2011 4 SA 508 (SCA), in which the effect of the termination of debt review was settled.

35 This is not specifically stated in the judgment.

36 *FirstRand Bank Ltd v Evans* para 4.

37 *FirstRand Bank Ltd v Evans* para 5.

38 This is the way in which it is expressed in the judgment, at para 6. It is not clear, it is submitted, what is meant when it is stated that an application for the re-arrangement of debt was "issued" in the magistrate's court. Perhaps this means that it had taken from 29 January 2009 until 3 July 2009 for the debt review application to be enrolled in the magistrate's court? In relation to the debt re-arrangement order, see also paras 10, 33, 34, 36, and 37. It may be noted that, although the judgment is not clear on the details concerning it, the court doubted the existence and validity of the debt re-arrangement order. This point is discussed further below.

August 2009 to 29 April 2010 in respect of the two mortgage bonds and the loan agreement in compliance with the debt re-arrangement order. In a letter to the bank's attorneys, Evans' attorneys had stated: "We cannot understand your client's persistence in prosecuting its claim against our client. In this regard we also refer to the ill-conceived sequestration application ..." ³⁹ Thereafter Evans' attorneys had launched an urgent application to stay the sale in execution and to seek rescission of judgment, and they filed an opposing affidavit in the sequestration application. The bank contended in a replying affidavit that the NCA was not a bar to an application for sequestration of the estate of the debtor and that, in any event, it had terminated the debt review. The bank also made the point that the amounts payable to it in terms of the debt re-arrangement order were insufficient to service the loans as the amount of interest due monthly exceeded the amount payable in terms of the order by an amount of about R4 000. The court noted that discrepancies in the figures presented by Evans in relation to his income and expenditure were impossible to reconcile. ⁴⁰

In October 2010 Evans informed the bank that he had sold the sectional title unit for an amount of R800 000 in excess of the value attributed to it by the bank. ⁴¹ By the time that the sequestration application was heard in February 2011, the default judgment had been rescinded by consent, ⁴² the sectional title property had been transferred after cancellation of the mortgage bond passed over it, and the proceeds of the sale – an amount of R1 260 208,64 – had been paid to the bank. The proceeds had fully discharged the amount that had been owed to the bank in respect of the commercial loan agreement and the excess had been credited to Evans' loan indebtedness, which was secured by the two mortgage bonds over his home. Although there was some dispute in relation to the amount that ought to have been credited to his account, FirstRand Bank did not challenge Evans' claim that in the circumstances he could repay the interest and capital within less than the sixteen years that remained of the original 20-year term of the mortgage bond. ⁴³ In spite of this, FirstRand Bank persisted in its application for the sequestration of his estate. It

39 *FirstRand Bank Ltd v Evans* para 6.

40 *FirstRand Bank Ltd v Evans* para 7.

41 *FirstRand Bank Ltd v Evans* para 8.

42 *FirstRand Bank Ltd v Evans* paras 6, 9.

43 *FirstRand Bank Ltd v Evans* para 10.

was argued on behalf of Evans that the NCA precluded such an application. Applying the reasoning in the decisions in *Investec v Mutemeri* and *Naidoo v ABSA*, the court rejected this argument. It was also contended on behalf of Evans that his letter did not constitute an act of insolvency but that in the event that the court did not accept this argument it should exercise its discretion in favour of Evans by refusing to grant the order.⁴⁴

4.2 The decision

The court, *per* Wallis J, as he then was, stated at the outset that the purpose of a debtor's applying for debt review in terms of section 86(1) of the NCA is always to obtain a declaration that he is over-indebted. Therefore, the court reasoned, "a debtor who informs his creditor that he has applied for, or is under, debt review is necessarily informing the creditor that he is over-indebted and unable to pay his debts".⁴⁵ The court considered the lapse of a period of almost a year between the date on which the letter was sent to the creditor and the date on which the application for sequestration was brought. It decided that the appropriate time for determining if a reasonable person in the position of the creditor would have construed the letter as a notice of inability to pay was when the letter was received. This was because "the question is what it means to the recipient at the time of its receipt".⁴⁶

Wallis J viewed the most pertinent fact known to the bank at the time when it received the letter to be that Evans "was significantly in default of his obligation under both the bonds and the loan agreement". He reasoned that the bank, clearly familiar with the provisions of the NCA, would have construed the letter as unequivocally conveying to it that he was unable to repay the amounts borrowed in accordance with his contractual undertakings.⁴⁷ The court regarded such a

44 *FirstRand Bank Ltd v Evans* para 11.

45 *FirstRand Bank Ltd v Evans* par a13. (It should be noted that, from para 13 of the judgment onwards, there is a discrepancy between the paragraph numbering reflected in the judgment that was published immediately after it was delivered by Wallis J and the judgment that was edited and published in Juta's *South African Law Reports*.)

46 *FirstRand Bank Ltd v Evans* para 15, with reference to *Optima Fertilizers (Pty) Ltd v Turner* 1968 4 SA 29 (D), *Meskin Insolvency Law* para 2.1.2.7, and *Chenille Industries v Vorster* 1953 2 SA 691 (O) 696 D-E.

47 *FirstRand Bank Ltd v Evans* para 16.

construction as having been reinforced by the fact that Evans was in arrears with his payments and was cancelling a debit order by means of which he was supposed to be meeting his obligations arising from the loan agreement. The court concluded that Evans was "unequivocally conveying to ... [the bank] that he was at that time unable to pay his debts".⁴⁸ Wallis J took into account the fact that the position is the same in relation to applications for administration orders in terms of section 74 of the *Magistrates' Courts Act* 32 of 1944.⁴⁹ He stated that an application for debt review under the NCA, as opposed to any other type of request for debt re-arrangement, did not change the fact that the letter was a notice of inability to pay debts.⁵⁰

The main contention put forward on behalf of Evans was that the NCA precluded an application by FirstRand Bank for the sequestration of Evans' estate.⁵¹ Counsel for Evans submitted that the effect of a debt re-arrangement order is to alter the debtor's contractual obligation to the creditor so that Evans was obliged to pay only a reduced sum every month in discharge of his indebtedness in terms of the mortgage bonds and not the amount upon which they had originally agreed.⁵² However, the court did not regard a debt re-arrangement order as altering the contractual obligation between the parties but as merely precluding the creditor from pursuing its contractual rights for so long as the debtor is complying with the debt re-arrangement order. Wallis J pointed out that if the debtor does not comply with the debt re-arrangement order the creditor is not restricted to claiming remedies on the basis of "an amended contract". Instead, the bar, or "moratorium",⁵³ on exercising or enforcing by litigation or other judicial process any right or security under the credit agreement is removed and the creditor is entitled to pursue in full its contractual remedies according to the terms of their original agreement.

However, the court stated that once it is recognised that an application for sequestration does not constitute the enforcement of a credit agreement it must follow that any moratorium to claiming payment under the credit agreement is not a

48 *FirstRand Bank Ltd v Evans* para 18.

49 Hereafter referred to as the "*Magistrates' Courts Act*". See *FirstRand Bank Ltd v Evans* para 22, with reference to *Madari v Cassim* 1950 2 SA 35 (D).

50 *FirstRand Bank Ltd v Evans* para 22.

51 *FirstRand Bank Ltd v Evans* paras 23-25.

52 *FirstRand Bank Ltd v Evans* paras 34, 35.

53 *FirstRand Bank Ltd v Evans* para 35.

bar to the granting of a sequestration order. According to this reasoning, the fact that a debt re-arrangement order has been issued by the magistrate's court does not necessarily affect the situation.⁵⁴ Wallis J considered it important that to hold "that the NCA operates to preclude credit providers from sequestering the estates of their debtors, but does not prevent other creditors from doing so", would give rise to the anomalous position that credit providers would be placed in "a class of creditor excluded from invoking the mechanisms of the *Insolvency Act*".⁵⁵

In the circumstances, the court decided that all of the requirements in terms of the *Insolvency Act* for the granting of a provisional sequestration order had been met. In this regard, it stated that the bank had a liquidated claim against Evans for more than R100, Evans had committed an act of insolvency in terms of section 8(g), and sequestration would be to the advantage of creditors as the realisation of Evans' assets would result in a not negligible dividend for creditors. The court stated that there were also matters that could properly be investigated by a trustee including, in view of the discrepancies in the figures furnished by Evans, the source and amount of his income, the identity of his employer (whom the court suspected might be his 17 year-old son), and the nature of his current business activities. Therefore, all that remained was for the court to consider if it ought to exercise its discretion against granting a provisional sequestration order.⁵⁶

Wallis J stated that he was unable to find much authority on how this discretion should be exercised. He noted that this might be an indication of how unusual it is for courts to exercise their discretion in favour of a debtor once all of the requirements had been established on a *prima facie* basis. He regarded the position as being that in the absence of special or unusual circumstances – which the respondent must establish – the court should ordinarily grant the provisional sequestration order. In this regard Evans relied on the lapse of almost a year between the date on which the letter was sent and the date on which the application for sequestration had been brought. He also relied on his compliance with the debt re-arrangement order between August 2009 and April 2010, in the course of which he reduced his

54 *FirstRand Bank Ltd v Evans* para 35.

55 *FirstRand Bank Ltd v Evans* para 25. Boraine and Van Heerden 2010 *PELJ* 118 also identified this anomaly.

56 *FirstRand Bank Ltd v Evans* para 26.

indebtedness to the bank by R200 000, as well as the improvement in his overall financial position by reason of the sale of one of the mortgaged properties.

The court dismissed the argument that the lapse of time was material to the proper use of its discretion as it did not regard this as a case where there had clearly been an improvement in the debtor's financial position that would render the act of insolvency "stale".⁵⁷ On the contrary, the court expressed the view that it was clear why and "hardly surprising" that the bank brought the application for sequestration when it did. As the court saw it, the bank had been confronted by the prospect of protracted litigation in respect of the default judgment that it had obtained against Evans. Further, in the face of the latter's mounting indebtedness to it, with the payments which he was making in terms of the debt re-arrangement order not even covering the interest which it was charging in terms of the original agreement, it had chosen to have recourse to sequestration proceedings. The court was also dismissive of Evans' anticipation of discharging his indebtedness to the bank as "overly optimistic"⁵⁸ and based on "a highly speculative assumption" about the improvement of his financial position.⁵⁹ The court was also sceptical about whether Evans had engaged in full and frank disclosure to it about his financial circumstances.⁶⁰ Finally, on this point, Wallis J quoted the *dictum* of Innes CJ in *De Waard v Andrew & Thienhaus Limited*⁶¹ that included the statement: "Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung on him ..."⁶²

Wallis J did accept that in a clear case, where the debts have been re-arranged by way of an order in terms of section 87 of the NCA and where it is apparent that this will result in the debts being discharged within a reasonable time, this would constitute a powerful reason for the court to exercise its discretion against the granting of a sequestration order.⁶³ However, in the circumstances the court did not

57 *FirstRand Bank Ltd v Evans* paras 30, 32.

58 *FirstRand Bank Ltd v Evans* para 31.

59 *FirstRand Bank Ltd v Evans* para 30.

60 *FirstRand Bank Ltd v Evans* para 31.

61 *De Waard v Andrew & Thienhaus Limited* 1907 TS 727 (hereafter "*De Waard v Andrew & Thienhaus Limited*").

62 *FirstRand Bank Ltd v Evans* para 33, with reference to *De Waard v Andrew & Thienhaus Limited* 733.

63 *FirstRand Bank Ltd v Evans* para 36.

regard the matter before it as being such "a clear case" because it doubted the existence and validity of the debt re-arrangement order.⁶⁴ Another factor that weighed against the exercise of the court's discretion in favour of Evans was that it viewed the debt re-arrangement order as purporting to extend his indebtedness to the bank far beyond the terms of the original agreements.⁶⁵ Wallis J also considered the submission on behalf of Evans that he was in possession of sufficient income to pay his outstanding indebtedness to the bank in the ordinary course by way of monthly instalments on a loan on conventional terms. Wallis remarked that if this was indeed the position then there should be no reason why Evans could not either apply for reinstatement of his loan from the bank or obtain a loan from another financial institution. Wallis J suspected that he had not done this because his financial position was not as good as had been portrayed by counsel on his behalf. In the result, the court declined to exercise its discretion in favour of Evans, the respondent, and it granted an order for the provisional sequestration of his estate.⁶⁶

4.3 Comments

The judgment in *FirstRand Bank v Evans* may be regarded as having extended the rationale behind the decisions in *Investec v Mutemeri* and *Naidoo v ABSA*, that sequestration proceedings do not constitute enforcement of a debt, to apply to a novel situation or sphere hitherto not addressed by the courts. This is the situation where an application for debt review in terms of the NCA constitutes an act of insolvency for the purposes of the *Insolvency Act*. Further, the position was different in *Investec v Mutemeri* and *Naidoo v ABSA* in that those cases concerned situations where the debtor had applied for debt review but not where a debt re-arrangement order had already been issued by the magistrate's court.

In *FirstRand Bank v Evans* the bank claimed that it had terminated the debt review in terms of section 86(10) of the NCA. On the other hand, Evans claimed that a debt re-arrangement order had been issued by the magistrate's court and that he had complied with its terms by making regular payments to the bank in accordance with

64 *FirstRand Bank Ltd v Evans* paras 35, 36. This aspect of the decision is discussed at 4.3 below.

65 *FirstRand Bank Ltd v Evans* paras 38, 39.

66 *FirstRand Bank Ltd v Evans* para 42.

it. Wallis J doubted the existence and validity of the debt re-arrangement order but adopted the approach that in any event the existence of a debt re-arrangement order did not affect the situation because the NCA did not preclude an application for sequestration of the debtor's estate.⁶⁷ Unfortunately, it is submitted, the judgment does not make it clear what the reason might have been for its existence and validity being open to doubt⁶⁸ nor what the issue surrounding "the provisional debt re-arrangement order", as the court referred to it,⁶⁹ entailed. How it came about that a rule *nisi* was issued by the magistrate's court is not explained. Nor is the reference by the court to "the impact of the order for a stay of operation of the debt re-arrangement order".⁷⁰ It is submitted that clarity on the facts surrounding this issue would have been useful in order better to understand the court's justification for not exercising its discretion in favour of the debtor, in the circumstances, to dismiss the application for the sequestration order.

Wallis J referred to "protestations" by Evans' counsel that the effect of the court's approach would be that any debtor who informs his creditors that he has applied for debt review or that he is in the process of debt review commits an act of insolvency.⁷¹ In response to this, with reference to the judgment of Caney AJ, as he then was, in *Madari v Cassim*,⁷² Wallis J pointed out that a debtor who applied for an administration order in terms of section 74 of the *Magistrates' Courts Act* was in precisely that situation. However, it may be noted that in *Madari v Cassim* the situation was not exactly the same. In that case, the debtor had applied for an administration order but it had not yet been granted. Therefore, when the creditor applied for the sequestration of the debtor's estate the latter's obligations had not yet been restructured by a court order. Further, in *Madari v Cassim* it was common cause that the respondent had committed an act of insolvency in terms of section 8(g) of the *Insolvency Act* by applying for an administration order in terms of section

67 *FirstRand Bank Ltd v Evans* para 35.

68 *FirstRand Bank Ltd v Evans* para 37.

69 *FirstRand Bank Ltd v Evans* para 34. Reference was also made to it at paras 27 (containing a reference to "the interim debt arrangement order"), 30 (containing a reference to payments having been made "purportedly in terms of a debt re-arrangement order"), 33 (containing a reference to the "alleged debt re-arrangement"), and 37 (a reference to "the status of the debt re-arrangement order ... [being] highly questionable").

70 *FirstRand Bank Ltd v Evans* para 37.

71 *FirstRand Bank Ltd v Evans* para 21.

72 *Madari v Cassim* 1950 2 SA 35 (D), hereafter referred to as "*Madari v Cassim*".

74 of the *Magistrates' Courts Act*.⁷³ In *Madari v Cassim* the court discharged the provisional order of sequestration on the basis that advantage to creditors had not been shown, but also stated:⁷⁴

Even if I felt that there were reason *prima facie* to believe that sequestration would be to the advantage of creditors, I would not be disposed in this case to confirm the provisional order, but to exercise a discretion against doing so. I consider that where a debtor has applied for an administration order in the circumstances in which the respondent has, this is a special consideration disentitling the petitioner to his order, within the contemplation of what Broome J said at p 165 in *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* (1940 NPD 163). In my opinion debtors such as the respondent, and in his circumstances, should not be deterred from using the machinery provided by sec 74 of the Magistrates' Courts Act, and creditors should, in general, show good reason for superseding applications under that section or otherwise allow their debtor at any rate an opportunity of being heard on his application if he has filed one with the clerk of the court.

The decision in *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz*, referred to in the passage quoted above, followed precedent established in *De Waard v Andrew & Thienhaus Limited*, which was also referred to by Wallis J.⁷⁵ However, it should be noted that the decision in *Madari v Cassim*, as indicated in the passage quoted above, qualified the statements made in both of those cases in relation to the entitlement of an applicant creditor to a sequestration order, in the circumstances. It is submitted that it ought also to be borne in mind that in *Madari v Cassim*, despite the lack of complete candour on the part of the debtor in that in his application for an administration order he had failed to disclose two of his debts, the court indicated that it nevertheless would *not* have granted a sequestration order.⁷⁶ This is in contradistinction to the approach of Wallis J in *FirstRand Bank v Evans*.

It is submitted that Evans' substantial reduction of his indebtedness to the bank, by applying the proceeds of the sale of the mortgaged sectional title property to it, could have been regarded as "a special consideration disentitling the petitioning creditor to his order", as contemplated by Broome J in *Port Shepstone Fresh Meat and Fish Co*

73 See, also, significant differences between the circumstances in *Madari v Cassim* and *FirstRand Bank Ltd v Evans* that Goosen J identified in *FirstRandBank v Janse van Rensburg*, discussed at 5.2 below.

74 *Madari v Cassim* 39.

75 See *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* 1940 NPD 163 165. See also *FirstRand Bank Ltd v Evans* para 33.

76 See *Madari v Cassim* 36.

(Pty) Ltd v Schultz. This is referred to in the passage quoted from the judgment in *Madari v Cassim*. It is therefore submitted that in the circumstances it would have been appropriate to refuse to grant the sequestration order and, in the light of his improved financial circumstances and the reduction of his indebtedness to the bank, to give Evans an opportunity to fulfil his obligations. This would also have been in keeping with the policy of consumer protection that is reflected in the NCA.

5 FirstRand Bank v Janse van Rensburg

5.1 The facts and the issues

In *FirstRand Bank v Janse van Rensburg* FirstRand Bank brought separate applications for the sequestration of the estate of each of two spouses, Heinrich and Azelle Janse van Rensburg, who were married to each other out of community of property. The applications were apparently unopposed by the respondents. The facts were that FirstRand Bank had lent and advanced money to a close corporation of which the respondents were members, each of whom held a 50% membership interest. In respect of such a loan obligation the respondents had undertaken suretyship obligations secured by way of a mortgage bond passed over their immovable property⁷⁷ in favour of the bank.

In each application for sequestration FirstRand Bank relied on the commission of an act of insolvency in terms of section 8(g) of the *Insolvency Act*. It alleged that each respondent had committed such an act of insolvency by applying in terms of section 86(7)(c) of the NCA to be declared over-indebted. To confirm this fact the bank relied on a consumer profile report issued by a credit bureau stating that each of the respondents had applied for debt review.⁷⁸ The court, *per* Goosen J, noted that the credit bureau reports simply reflected that each respondent had "applied for a debt rehabilitation or to be placed under debt review with a registered debt counsellor" and that no further details were supplied except that application had been made on 23 March 2011. The court requested counsel specifically to address the question of if

⁷⁷ There was some doubt as to whether or not it was owned by both of them; see *FirstRand Bank v Janse van Rensburg* para 4.

⁷⁸ *FirstRand Bank v Janse van Rensburg* para 5.

an application for debt review constitutes an act of insolvency and if in the circumstances the applicant had established that an act of insolvency in terms of section 8(g) of the *Insolvency Act* had been committed.⁷⁹

5.2 The decision

Counsel for FirstRand Bank submitted that the judgment of Wallis J in *FirstRand Bank v Evans* "is clear authority for the proposition that the fact of an application for debt review constitutes an act of insolvency which falls within the ambit of section 8(g) of the *Insolvency Act*" and that proof of that fact is therefore sufficient to enable an applicant to rely on the provisions of section 8(g).⁸⁰ However, Goosen J found this argument to be without merit. He stated that in his view the judgment in *FirstRand Bank v Evans* is not authority for the general proposition that the mere fact of an application for debt review in terms of the NCA constitutes compliance with the provisions of section 8(g) of the *Insolvency Act*. Goosen J pointed out that the finding that Evans had committed an act of insolvency turned on his delivery to the bank of a written notice drawing to its attention that he had been placed under debt review and, in the light of the particular facts of the case, on the reasonable interpretation of such a written notice by the bank.⁸¹ Goosen J emphasised that Wallis J had not been called upon to decide nor did he hold that notice of the mere fact of an application for debt review *ipso facto* constitutes written notice of inability to pay a debt as required by section 8(g).⁸²

Further, Goosen J viewed Wallis J's remarks that the position in relation to debt review is not novel but is the same as the position in relation to administration orders

79 *FirstRand Bank v Janse van Rensburg* paras 6-7.

80 *FirstRand Bank v Janse van Rensburg* para 15.

81 *FirstRand Bank v Janse van Rensburg* paras 16-17. Goosen J further pointed out that Wallis J's approach, relying on a *dictum* in *Standard Bank of South Africa Ltd v Court* 1993 3 SA 286 (C) 292 H-J, which was later approved by the Appellate Division in *Court v Standard Bank of South Africa Ltd* 1995 3 SA 123 (A) 134 A-C, was consistent with a long line of authorities which require a court, in the construction of a written notice alleged to be a notice in terms of s 8(g), to consider the terms of such a notice and, where appropriate, the circumstances in which it was given to a creditor. Goosen J referred in this regard to *Barlows (Eastern Province) Ltd v Bouver* 1950 4 SA 385 (E) 390; *Shaban & Co (Pty) Ltd v Plank* 1966 1 SA 59 (O); *Rodrew (Pty) Ltd v Rossouw* 1975 3 SA 137 (O); *Du Plessis v Tzerefos* 1979 4 SA 819 (O); and *Optima Fertilizers (Pty) Ltd v Turner* 1968 4 SA 29 (D).

82 *FirstRand Bank v Janse van Rensburg* paras 16, 18 and 19.

in terms of section 74 of the *Magistrates' Courts Act* as having been made *obiter*.⁸³ Goosen J pointed out that the judgment in *Madari v Cassim* is not authority for the proposition that an application for debt review in terms of the NCA constitutes in itself an act of insolvency.⁸⁴ He stated that in *Madari v Cassim* the decision did not turn on whether an act of insolvency had been committed – its commission appeared to have been common cause – but pointed out that the issue was whether it had been established that sequestration would be to the advantage of creditors.⁸⁵

Goosen J also explained that the procedure to be followed in an application for an administration order in terms of section 74 of the *Magistrates' Courts Act* is materially different from that required by the NCA for debt review. He pointed out that the former procedure "constitutes a 'modified form of insolvency' applicable to small estates in which a *concursum creditorum* is created allowing for a court-sanctioned debt rearrangement".⁸⁶ Further, an application for an administration order requires the submission of a detailed statement of affairs that sets out the financial affairs of the applicant (the correctness of which must be confirmed under oath by the applicant), a motivation for the basis upon which the applicant is unable to meet his financial obligations and, significantly, the delivery of a notice of the application to creditors.⁸⁷ Thus, as Goosen J explained, the application itself meets the requirements of section 8(g) of the *Insolvency Act* in that the debtor gives notice in writing to the creditor that he is unable to pay his debts. Therefore, he stated, the authorities dealing with applications for administration orders ought to be read in this context.⁸⁸ Goosen J added that, according to the established precedent relevant to applications for administration orders in terms of section 74 of the *Magistrates' Courts Act*, in construing the notice to the creditor for the purposes of determining whether it constitutes an act of insolvency in terms of section 8(g) of the *Insolvency Act* or not, the whole content of the application (for an administration order) should be considered. This was required in order to ensure that "the notice conveys an

83 *FirstRand Bank v Janse van Rensburg* para 19.

84 *FirstRand Bank v Janse van Rensburg* para 20.

85 *FirstRand Bank v Janse van Rensburg* para 21.

86 *FirstRand Bank v Janse van Rensburg* para 22, with reference to Jones and Buckle *Civil Practice of the Magistrate's Courts*, *Madari v Cassim* 38 and *Weiner v Broekhuysen* 2003 4 SA 301 (SCA) para 3.

87 *FirstRand Bank v Janse van Rensburg* para 23.

88 *FirstRand Bank v Janse van Rensburg* paras 24 and 25.

unequivocal statement of inability to pay ... and that the creditor receiving the notice can reasonably conclude that the debtor is unable rather than merely unwilling to pay his debts".⁸⁹

On the other hand, as Goosen J pointed out, the procedure required for an application for debt review in terms of the NCA is very different from that which an application for an administration order in terms of section 74 of the *Magistrates' Courts Act* entails. In terms of section 86 of the NCA read with regulation 24 of the *Regulations* promulgated in terms of it, a consumer debtor applies for debt review by submitting a completed NCR Form 16, together with certain specified documents and information, to a registered debt counsellor. Thereafter, within a stipulated period the debt counsellor is required to issue all credit providers identified in the application with a notice in the prescribed NCR Form 17.1 informing them that an application for debt review has been received. After making a determination, again within a stipulated period, the debt counsellor is obliged to issue a further notice in the prescribed NCR Form 17.2 informing them of the outcome. This would be whether the debtor has been found not to be over-indebted as envisaged by section 79 of the NCA or has been declared to be over-indebted and has been referred to a magistrate for debt restructuring.⁹⁰

In the result, as Goosen J stated, an application for debt review in terms of section 86 of the NCA does not entail the debtor's giving written notice to the creditor of an inability to pay one or more of his debts. He reasoned further that a notice of inability to pay as envisaged by section 8(g) of the *Insolvency Act* must be given deliberately and with the intention of giving such notice⁹¹ and must be such that a creditor can reasonably conclude that that the debtor is unable to pay his debts. However, it ought to be borne in mind that in order to constitute an act of insolvency in terms of section 8(g) of the *Insolvency Act*, regardless of the fact that the creditor might have

89 *FirstRand Bank v Janse van Rensburg* para 26, with reference to *Barlows (Eastern Province) Ltd v Bouwer* 1950 4 SA 385 (E); *Shaban & Co (Pty) Ltd v Plank* 1966 1 SA 59 (O); and *Rodrew (Pty) Ltd v Rossouw* 1975 3 SA 137 (O).

90 *FirstRand Bank v Janse van Rensburg* para 27.

91 *FirstRand Bank v Janse van Rensburg* para 28, with reference to Bertelsmann, Mars and Nagel *Law of Insolvency* 97.

construed the notice in this manner, the words of the notification must convey an unequivocal statement by the debtor of his inability to meet his obligations.⁹²

Turning to the facts of the case in *FirstRand Bank v Janse van Rensburg*, the court noted that the bank had not relied on any written communication to it by each debtor but merely on a profile report issued by a credit bureau reflecting that they had applied for debt review in terms of the NCA. Goosen J also pointed out that the profile report did not contain details of the terms of the application for debt review nor any reference to statements and declarations made by the debtors, nor any information on which the creditor could determine that it was an unequivocal statement of an inability to pay. Thus, in the court's view it did not constitute an act of insolvency in terms of section 8(g) of the *Insolvency Act*.⁹³

The court dealt further with the bank's reliance on inferential reasoning in the sense that it contended that a debtor seeks debt review when he is over-indebted and that the very fact that a debtor seeks a declaration of over-indebtedness is indicative of a declaration of an inability to pay one or more of his debts. Goosen J regarded such inferential reasoning not only as unsound but also as contrary to the express requirements of section 8(g) of the *Insolvency Act*, that a debtor must give written notice to a creditor of his inability to pay his debts.⁹⁴ The court also alluded to the further difficulty in the matter before it that the written notice relied upon by FirstRand Bank had not been communicated by the debtor but by a credit bureau that did not have the debtors' necessary authority to make declarations on their behalf nor to bind them to declarations made in relation to their affairs. Goosen J referred in this regard to the judgment in *Eli Spilkin (Pty) Ltd v Mather*⁹⁵ in which Kannemeyer J stated:⁹⁶

If an agent, on behalf of a debtor, writes a letter which amounts to an act of insolvency in terms of section 8(g) of the Insolvency Act the court must be satisfied

92 *FirstRand Bank v Janse van Rensburg* para 28, with reference to Bertelsmann, Mars and Nagel *Law of Insolvency* 99; *Barlows (Eastern Province) Ltd v Bouwer* 1950 4 SA 385 (E); and *Optima Fertilizers (Pty) Ltd v Turner* 1968 4 SA 29 (D).

93 *FirstRand Bank v Janse van Rensburg* paras 29-30.

94 *FirstRand Bank v Janse van Rensburg* para 31.

95 *Eli Spilkin (Pty) Ltd v Mather* 1970 4 SA 22 (E), hereafter referred to as "*Eli Spilkin v Mather*".

96 *Eli Spilkin v Mather* 24A-B, referred to in *FirstRand Bank v Janse van Rensburg* para 32.

that the principal knew that the letter was being written in those terms and consented to it being so written.

Distinguishing the situation where an act of insolvency may be committed "through an agent" who manages the principal's affairs,⁹⁷ Goosen J concluded that the credit bureau had not acted on the basis of any authority specifically conferred on it by the respondents nor on any general authority which bound them. The court further did not find that the content of the credit bureau's report was evidence of the existence of a Form 16 declaration made by the respondents nor that such a declaration in the ordinary course necessarily amounts to a declaration of an inability to pay. Goosen J viewed such reasoning as extending the reach of section 8(g) of the *Insolvency Act* far beyond its purpose.⁹⁸

The judgment noted that counsel had pointed out that a Form 17.1 notice had not been delivered to the applicant as required by the NCA and that it did not have access to the Form 16 application made to the debt counsellor. Therefore counsel had argued that the credit bureau's report should be accepted as the best evidence available to it of the commission of the act of insolvency. In relation to this argument, Goosen J stated:⁹⁹

That may indeed be so but it is not sufficient. An applicant who seeks to invoke the provisions of the Insolvency Act must prove either that an act of insolvency as specifically provided by the Act has been committed or that the respondent is actually insolvent. If the applicant is not able to do so it cannot succeed with the sequestration order.

In the result, the applications for the sequestration of the estates of both respondents were dismissed.¹⁰⁰

5.3 Comments

The effect of the judgment in *FirstRand Bank v Janse van Rensburg* is to introduce important qualifications in principle to the decision of Wallis J in *FirstRand Bank v*

97 As, so Goosen J stated at para 33, had been the case in *Eli Spilkin v Mather*.

98 *FirstRand Bank v Janse van Rensburg* para 34.

99 *FirstRand Bank v Janse van Rensburg* para 35.

100 *FirstRand Bank v Janse van Rensburg* para 37-38.

Evans. It is submitted that, following the rationale and decision in *FirstRand Bank v Janse van Rensburg*, the following two significant points may be made. First, the fact that a debtor has applied for debt review in terms of the NCA does not *per se* constitute the commission of an act of insolvency as envisaged by section 8(g) of the *Insolvency Act*. It is submitted that this makes logical sense and accords with the approach of the Supreme Court of Appeal in *Collett v FirstRand Bank Ltd*,¹⁰¹ delivered after *FirstRand Bank v Evans*. In *Collett v FirstRand Bank*, the appeal court stated that an application by a debtor for debt review, to be declared over-indebted, and to have debts arising from credit agreements rescheduled are "novel concepts" introduced by the NCA with the purpose "to assist not only consumers who are over-indebted but also those who find themselves in 'strained' circumstances".¹⁰² It is therefore submitted that one cannot assume that a debtor who applies for debt review with a view to having his debts re-arranged is unequivocally declaring that he is unable to pay his debts and not merely conveying an unwillingness to do so in his financially "strained" circumstances. In *FirstRand Bank v Janse van Rensburg*, Goosen J regarded the inferential reasoning that counsel for FirstRand Bank sought to be applied to the situation, in order to find that an act of insolvency in terms of section 8(g) of the *Insolvency Act* had been committed, as excessive. It is submitted that this stance is to be preferred to the approach adopted by Wallis J in *FirstRand Bank v Evans* that "a debtor who informs his creditor that he has applied for or is under debt review is necessarily informing the creditor that he is over-indebted and unable to pay his debts".¹⁰³

The second point that emerges clearly from the judgment in *FirstRand Bank v Janse van Rensburg* is that there are substantial differences between an application for an administration order in terms of section 74 of the *Magistrates' Courts Act* on the one hand, and an application for debt review in terms of section 86 of the NCA on the other. These differences exist not only in the procedure required for each type of

101 *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA), hereafter referred to as "*Collett v FirstRand Bank*".

102 *Collett v FirstRand Bank* para 9. It may be noted that this passage was emphasised by counsel for Evans during argument on the return day, on 26 August 2011. (Respondent's heads of argument are on file with the author.) According to information obtained by the author from legal representatives of Evans, a differently constituted court confirmed the provisional sequestration order and the matter has gone on appeal.

103 *FirstRand Bank Ltd v Evans* para 13.

application but also in the policies reflected in the NCA and the *Insolvency Act* respectively. Therefore, precedent relevant to applications for administration orders in terms of section 74 of the *Magistrates' Courts Act* should not be applied automatically, in cases concerning the NCA and its interface with the *Insolvency Act*, to hold that an application for debt review amounts to an act of insolvency in terms of section 8(g) of the *Insolvency Act*. It is submitted that this was correctly pointed out by Goosen J.¹⁰⁴

The facts of *FirstRand Bank v Janse van Rensburg* are clearly distinguishable from those in *FirstRand Bank v Evans*. In *FirstRand Bank v Janse van Rensburg* the applicant did not establish that written notice had been given by the debtors to any of their creditors that they were unable to pay any of their debts. This was because the court did not regard a report issued by a credit bureau, reflecting that they had "applied for a debt rehabilitation or to be placed under debt review with a registered debt counsellor" as being sufficient evidence of the commission of an act of insolvency as envisaged by section 8(g) of the *Insolvency Act*. It may also be noted that in *FirstRand Bank v Janse van Rensburg* no other evidence was advanced to establish that the respondents had been declared over-indebted or that their debts had been re-arranged by the court in consequence of the debt review process.

Reading between the lines, one might gain the impression from the judgment in *FirstRand Bank v Janse van Rensburg* that if the Form 17.1 notification had been delivered to the applicant as required by the NCA, the position might have been different. However, it should be borne in mind that according to the judgment delivery of the Form 17.1 notification may constitute an act of insolvency in terms of section 8(g) only if it contains sufficient detail to amount to the debtor's giving notice in writing – albeit through the agency of a debt counsellor – to any one of his creditors that he is unable to pay any of his debts. Further, the content of the written notice must be such that the reasonable creditor, given its knowledge at the time of the receipt of the notice, would construe the notice as an unequivocal declaration that the debtor is unable, and not merely unwilling, to pay his debts. However, given the

104 See *FirstRand Bank v Janse van Rensburg* paras 25 and 26.

prescribed text of NCR Form 17.1,¹⁰⁵ it is submitted that it would be unlikely in practice for it to contain the sort of detailed information that would necessarily render it an unequivocal declaration of an inability to pay as required by section 8(g) of the *Insolvency Act*, in the light of the courts' interpretation of this subsection. Further, as Goosen J pointed out, for any notification by a debt counsellor to the creditors to constitute an act of insolvency in terms of section 8(g) of the *Insolvency Act*, it would have to be authorised by the debtor in order to be regarded as binding on the latter.

Neither *FirstRand Bank v Evans* nor *FirstRand Bank v Janse van Rensburg* dealt with an act of insolvency as envisaged by section 8(e) of the *Insolvency Act*. It may be recalled that this was one of the acts of insolvency initially alleged to have been committed in *Nedbank v Andrews*. It is submitted that the decisions in *FirstRand Bank v Evans* and *FirstRand Bank v Janse van Rensburg* provide no indication of any reason, in theory, why the debt review and re-arrangement process would not constitute an act of insolvency in terms of section 8(e) of the *Insolvency Act*. However, it may be noted that in terms of section 8(e) a debtor commits an act of insolvency if he "makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts". Given that the NCA envisages that the debtor will satisfy his debts in full, the offer of the arrangement by the debtor may not necessarily include any proposition for or contemplation of any release from any debts.

6 Implications of the recent decisions in relation to consumer debt relief measures

Otto and Otto stated that "[t]he exact influence of insolvency law on the *National Credit Act*, and *vice versa*, is something that still has to be worked out by the courts".¹⁰⁶ Indeed, the recent judgments seem to suggest that this is precisely what the courts are engaged in doing. Otto and Otto noted that Van Heerden had suggested that an application for debt review in terms of the relevant provisions of

¹⁰⁵ See Form 17.1 in the *Regulations to the NCA* published in GNR 489 in GG 28864 of 31 May 2006.

¹⁰⁶ Otto and Otto *National Credit Act Explained* 134.

the NCA might constitute an act of insolvency in terms of the *Insolvency Act*.¹⁰⁷ Otto and Otto pointed out that it could be argued, on the other hand, that the "well-intentioned legislative initiative" reflected in the NCA's unique procedure, including debt review and re-arrangement, would be frustrated if sequestration might "*ipso iure* follow upon an application for debt review". In other words, it could be argued that the NCA "as *lex specifica* should enjoy preference over the *Insolvency Act* ... and insolvency law in this particular instance".¹⁰⁸ However, they left the question open, stating that it remained to be seen what the courts would decide in this respect. In *FirstRand Bank v Evans*, clearly the court held that a letter by a debtor to the creditor conveying the fact of his application for debt review in particular circumstances constitutes an act of insolvency in terms of section 8(g) of the *Insolvency Act*. However, it remains to be seen if this decision will be followed.¹⁰⁹ Further, as stated above, neither *FirstRand Bank v Evans* nor *FirstRand Bank v Janse van Rensburg* necessarily excludes an application for debt review and debt re-arrangement's constituting an act of insolvency in terms of section 8(e) of the *Insolvency Act*.

It is submitted that a clear decision is required in relation to whether or not a creditor may obtain an order for the sequestration of the estate of a debtor who is making regular payments in compliance with a debt re-arrangement order in terms of the NCA. While this may indeed be the position in the light of the fact that the NCA does not specifically preclude it, clarity is nevertheless required on how a court ought to exercise its discretion whether to grant or dismiss an application for a sequestration order in such circumstances. Clearly, in the context of the decision in *FirstRand Bank v Janse van Rensburg*, precedents regarding the commission of acts of insolvency in applications for administration orders in terms of section 74 of the *Magistrates' Courts Act* are not directly applicable. As far as the exercise of the court's discretion is concerned, Van Heerden and Boraime suggested that a court could, in an application for sequestration, determine that "a debt restructuring order should be maintained as it appears to be more advantageous [to creditors] than sequestration".¹¹⁰

107 Otto and Otto *National Credit Act Explained* 134, with reference to Van Heerden "The interaction between debt review" 153.

108 Otto and Otto *National Credit Act Explained* 134.

109 See comments at n 102 above.

110 Van Heerden and Boraime 2009 *PELJ* 55.

As noted above, in *Collett v FirstRand Bank* the Supreme Court of Appeal stated that debt review, a declaration of over-indebtedness, and the rescheduling of debts arising out of credit agreements are "novel concepts" introduced by the NCA with the purpose "to assist not only consumers who are over-indebted, but also those who find themselves in 'strained' circumstances".¹¹¹ It is submitted that the effect of the decision in *FirstRand Bank v Evans* was to counteract such assistance, which in the circumstances the debtor had sought and had already received. If a debtor is making regular payments in accordance with a debt re-arrangement order issued in terms of section 87 of the NCA and his estate is nevertheless sequestrated by a creditor whose claim arises out of an obligation that is subject to the debt re-arrangement order, the debtor is left in an anomalous and vulnerable position. It is submitted that this could not have been what the legislature intended, and that the possibility of this eventuating reflects the presence of a *lacuna* in the provisions of the NCA.¹¹²

In the circumstances, it is submitted that statutory amendments should be brought about to provide for an explicit, workable relationship between the debt review process and sequestration.¹¹³ Consideration should be given to the suggestions made by Maghembe for the amendment of relevant provisions of the NCA to preclude a creditor from bringing an application for the sequestration of the debtor's estate in specific circumstances.¹¹⁴ However, it is submitted that even more extensive legislative intervention is called for. It is submitted that *FirstRand Bank v Evans* is indicative of the need, on a practical level, for solutions to be found in order to combat or at least reduce credit grantors' opposition or resistance to debt review and debt restructuring as consumer debt relief measures that pose alternatives to sequestration.¹¹⁵ From the judgment in *FirstRand Bank v Evans* it appears that the bank's main concern was the fact that the monthly payment due to it in terms of the debt restructuring order did not even cover the interest which would have been due

¹¹¹ *Collett v FirstRand Bank* para 9, referred to at n 101 and n 102 above.

¹¹² See also remarks in this regard by Otto and Otto *National Credit Act Explained* 134, referred to at n 108 above.

¹¹³ See also Maghembe 2011 *PELJ* 178-179; Kupiso 2011 *De Rebus* 27.

¹¹⁴ After *Naidoo v ABSA*, Maghembe 2011 *PELJ* 178-179 suggested specific amendments to ss 88(3) and 129 of the NCA.

¹¹⁵ See in this regard Roestoff *et al* 2009 *PELJ* 298.

according to their original agreement.¹¹⁶ Where this is indeed the case, one may appreciate why a creditor, and especially a secured creditor such as a mortgagee, might prefer to proceed with the sequestration of the debtor's estate in order to have the assets, including hypothecated property, liquidated and the debt satisfied out of the proceeds of their sale. However, this leaves the debtor in a vulnerable position despite his having availed himself of the formal consumer debt relief measures that are available to him.¹¹⁷

It is submitted that the current position, especially in the light of *FirstRand Bank v Evans*, vitiates the effectiveness of the entire consumer debt relief system introduced by the NCA.¹¹⁸ It may thwart debtors' *bona fides* and genuine efforts to access the formal statutory debt relief mechanisms, and it may also tend to encourage the abuse of process by creditors who wish to circumvent the NCA's requirements for the enforcement of debts arising out of credit agreements.¹¹⁹ However, of even greater concern is the possibility that the consumer debt relief system and procedure, including the provision for the sequestration of insolvent estates in terms of the *Insolvency Act* and for debt review and debt restructuring measures in terms of the NCA, do not conform to internationally recognised principles and recommendations in relation to rehabilitation procedures as alternatives to liquidation procedures.¹²⁰ It may be noted that internationally a more debtor-orientated approach is advocated.¹²¹ Significantly, in the formulation of the principles that underlie the resolution of consumer debt problems the recently published *INSOL International Consumer Debt Report II* states:¹²²

116 *FirstRand Bank Ltd v Evans* para 7. Borraine and Van Heerden 2010 *PELJ* 120 cite this as one of the situations where they would anticipate that a creditor might wish to apply for the sequestration of a debtor's estate after a debt re-arrangement order has been issued.

117 A similar observation may be made in relation to administration under s 74 of the *Magistrates' Courts Act*. However, the differences between s 74 of the *Magistrates' Courts Act* and the debt review and debt re-arrangement provisions in the NCA, as emphasised by Goosen J in *FirstRand Bank v Janse van Rensburg* paras 19-28, should be borne in mind.

118 A similar view was expressed by Kupiso 2011 *De Rebus* 26. See also the remarks by Otto and Otto *National Credit Act Explained* 134, referred to at n 108 above.

119 See Borraine and Van Heerden 2010 *PELJ* 117.

120 See *INSOL International Consumer Debt Report II* 1-24.

121 See *INSOL International Consumer Debt Report II*; Evans 2010 *CILSA* 337; Van Heerden and Borraine 2009 *PELJ* 53; Calitz 2007 *Obiter* 397; Roestoff and Renke 2005 *Obiter* 561; Roestoff and Renke 2006 *Obiter* 98.

122 *INSOL International Consumer Debt Report II* 10-11.

... [F]or effective help to be made available to the consumer debtor, it should not be structured solely by way of discharge through bankruptcy proceedings, which will be mainly court-driven procedures requiring the involvement of a [*sic*] insolvency representative or administrator. ...

Help should also be directed at both finding a solution for the adverse financial situation and, as far as possible, preventing the debtor from getting into debt again. This may also require an out-of-court or extra-judicial approach and the involvement of a debt counsellor, a consumer advisory bureau or a social worker.

Notably, as part of the "first principle" established in the *INSOL International Consumer Debt Report II* it is recommended that a debtor should be free to choose between a liquidation procedure and a rehabilitation procedure.¹²³ A rehabilitation procedure is defined as one which "is designed to give the consumer debtor time to recover from temporary or more permanent liquidity difficulties and provide a way, through debt counseling or debt-restructuring, to reorganize his financial affairs." It is also recommended that upon the successful completion of the procedure "the debtor will obtain discharge or prepare a rehabilitation plan, composition or scheme of arrangement which is typically required to be approved by a majority of the creditors ... and ... by the court".¹²⁴ Forming part of the "first principle" is also the recommendation that:¹²⁵

Creditors should be prohibited from pursuing the debtor during the insolvency process. If this were otherwise, creditors who chose not to be bound by the process would prevail over those utilizing the collective mechanism.

In addition the law should take into account the issues that are generally provided for in any insolvency law. In this respect reference is made to provisions regarding the handling of encumbered assets and the position of secured creditors, treatment of contracts ... and the priority of distribution.

It is submitted that by the phrase "insolvency process", which is to be found in this "first principle", is meant the consumer debt relief process, which includes both liquidation and rehabilitation procedures. It may be observed that, as illustrated by

123 *INSOL International Consumer Debt Report II* 16.

124 *INSOL International Consumer Debt Report II* 12.

125 *INSOL International Consumer Debt Report II* 17.

cases such as *Investec v Mutemeri*, *Naidoo v ABSA*, *FirstRand Bank v Evans* and *Ex parte Ford*, the South African consumer debt relief mechanisms clearly do not conform to these recommendations in at least the following respects.

- According to *FirstRand Bank v Evans* and *Ex parte Ford*, a debtor is not free to choose between the liquidation process provided for by sequestration in terms of the Insolvency Act and the "rehabilitation procedure" posed by the debt review and debt restructuring provided for by the NCA.
- No discharge from liability is available to the debtor who undergoes the NCA's "rehabilitation procedure".
- The effect of *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans* is that a creditor who chooses not to be bound by the NCA's process is entitled to "pursue" the debtor during such a process by applying for and obtaining an order for the sequestration of the debtor's estate. Therefore, the creditor who insists on sequestration "prevail[s] over those utilizing the collective mechanism" provided for by the NCA.
- In the "rehabilitation procedure" afforded by the NCA, when a magistrate's court issues a debt restructuring order it has the power in effect to override or overlook "provisions regarding the handling of encumbered assets and the position of secured creditors, treatment of contracts ... and the priority of distribution" in that it can restructure obligations between the debtor and even a secured creditor such as a mortgagee of the debtor's home without the secured creditor's specific agreement on the restructured terms.¹²⁶ The resultant restructured payment terms may be unsatisfactory or even untenable from the perspective of the mortgagee.

For years academic commentators have pointed out that the South African insolvency regime does not provide for an effective, easily accessible, consumer debt relief mechanism as an alternative to the sequestration process currently available in terms of the *Insolvency Act*, which entails the liquidation of assets.¹²⁷ Strong calls have been made for the requirement of the advantage of creditors not to apply invariably, thus denying debtors who are "too poor" the opportunity to benefit

¹²⁶ This is referred to in American parlance as "cram down"; see Ferriell and Janger *Understanding Bankruptcy* 654-657.

¹²⁷ See, for example, Boraine and Roestoff 1993 *De Jure* 229; Boraine and Roestoff 1994 *De Jure* 31; Evans 2001 *SA Merc LJ* 485; Boraine 2003 *De Jure* 217; Calitz 2007 *Obiter* 414; Boraine and Roestoff 2002 *Int Insolv Rev* 1.

by relief from the burden of debt which the *Insolvency Act* provides through rehabilitation.¹²⁸ Commentators have emphasised the need for a consumer debt relief measure that balances the interests of debtors and creditors and society generally. This they envisage through the re-arrangement of debts so that they are payable over a reasonable, limited period and culminating in a measure of discharge from liability in accordance with a policy of providing an "honest" consumer debtor with a "fresh start". This feature is universally accepted as appropriate for an effective consumer debt relief system.¹²⁹ They have expressed the desirability of establishing a legislative and administrative framework that facilitates "single portal access" to the insolvency system.¹³⁰ It is submitted that the judgments in *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA*, *FirstRand Bank v Evans* and *FirstRand Bank v Janse van Rensburg* illustrate and tend to confirm the existence of such a need.

It is within this context that it is submitted that more extensive legislative intervention, as suggested above, could include something along the lines of the reform initiative proposed by the South African Law Reform Commission in its report on the review of the law of insolvency, completed in February 2000. It proposed as a new section 74X of the *Magistrates' Courts Act*, a novel pre-liquidation composition procedure.¹³¹ This proposal came to nought, but a similar provision has been included as section 118 of an unofficial working draft of a proposed *Insolvency and Business Recovery Bill* compiled in 2010.¹³² It is submitted that this proposed pre-liquidation composition procedure, suitably revised and modified, has the potential to provide the type of

128 Boraine and Roestoff 2002 *Int Insolv Rev* 11; Evans 2001 *SA Merc LJ* 508, referred to by Van Heerden and Boraine 2009 *PELJ* 161; Evans 2010 *SA Merc LJ* 483; Evans 2011 *PELJ* 39 52.

129 See, in this regard, INSOL *International Consumer Debt Report II* 9-11, 15, 20-21; INSOL *International Consumer Debt Report*; McKenzie Skene 2010 *Int Insolv Rev* 29; McKenzie Skene 2005 *Int Insolv Rev* 1 14; Van Apeldoorn 2008 *Int Insolv Rev* 57; Calitz 2007 *Obiter* 414; Van Heerden and Boraine 2009 *PELJ* 58.

130 See Calitz 2007 *Obiter* 414, with reference to Boraine 2003 *De Jure* 217. See also, for example, Boraine and Roestoff 2000 *Obiter* 267; Van Heerden and Boraine 2009 *PELJ* 59.

131 For a discussion of the proposed s 74X as an alternative to sequestration, see Boraine and Roestoff 2002 *Int Insolv Rev* 8-11. It may be noted that at the time it published its report the South African Law Reform Commission was called the South African Law Commission. However, in this article it will be referred to by its current name.

132 An unofficial working copy is on file with the author and is available, upon request, from Mr MB (Tienie) Cronje (mcronje@justice.gov.za), researcher at the Department of Justice and Constitutional Development (Department of Justice and Constitutional Development *Unofficial working draft*).

debt relief mechanism that commentators have been calling for.¹³³ It may provide an answer for over-indebted consumer debtors who have at least some regular income with which they may service their debt, even if this must occur over a longer period than that originally contracted. In terms of the proposed section 118, the claims of secured and preferent creditors remain unaffected, unless they consent in writing to an amendment of their obligations, but a debtor may have his debts to concurrent creditors restructured and made payable by lower regular instalments over a longer period. At the end of the repayment period, the debtor stands to benefit by a measure of discharge from liability. It may be noted that these features are universally accepted as appropriate for an effective consumer debt system.¹³⁴ Further, it is submitted that with secured and preferent creditors' claims remaining unaffected, the type and level of opposition to debt restructuring encountered in *FirstRand Bank v Evans* would probably not occur, as long as the terms of the restructuring orders are feasible.

An advantage of the proposed section 118 is that it would apply in respect of all types of debts and not only those arising from credit agreements, as is the position in the NCA. This would rule out the anomaly, to which Borraine and Van Heerden as well as Wallis J in *FirstRand Bank v Evans* alluded, that would arise if it were to be held that a credit provider is barred from applying for the sequestration of a debtor's estate after the latter has applied for debt review in terms of the NCA.¹³⁵ It would also be more useful than an administration order in terms of section 74 of the *Magistrates' Courts Act* with its limited application to cases where the total debt does not exceed an amount of R50 000 and its exclusion of *in futuro* debts.¹³⁶ Further, the fact that the section 118 pre-liquidation composition procedure is located in proposed insolvency legislation would have the advantage that an appropriately modified provision could allow the court to determine within the framework of a single insolvency statute whether the composition process or the liquidation process is more appropriate, depending on the particular circumstances of the case. Provision could also be made for the simple, streamlined conversion between the two

133 Aspects of s 118 of the working draft of a proposed *Insolvency and Business Recovery Bill* were highlighted by Coetzee "Personal bankruptcy and alternative measures".

134 See works cited at n 121, n 127, n 128 and n 129 above.

135 See Borraine and Van Heerden 2010 *PELJ* 118; *FirstRand Bank Ltd v Evans* para 25. See also n 55 above.

136 See Borraine 2003 *De Jure* 217.

processes where appropriate.¹³⁷ The need for this might arise, for instance, where the debtor fails to comply with the terms of the composition. Thus, the single insolvency statute in which the composition procedure and the liquidation procedure would both operate could explicitly state the relationship between them.

It may be noted that the South African Law Reform Commission's original proposal, in February 2000, incorporated a proposed section 74X(16) of the *Magistrates' Courts Act* in terms of which, where a debtor's offer of composition was rejected by creditors, the debtor could opt to have his estate liquidated in terms of the *Insolvency Act*.¹³⁸ This part of the provision does not appear in section 118 of the unofficial working draft of a proposed *Insolvency and Business Recovery Bill*, presumably because of criticisms levelled at its potential for encouraging an abuse of the process by debtors.¹³⁹ It is submitted that the omitted text, suitably modified to counter this potential effect, might be considered for re-incorporation in the proposed section 118 to provide for convenient mobility between the composition and liquidation procedures at the instance of either the debtor or a creditor where circumstances require such mobility. Further, currently the proposed section 118(23) provides that between the date of determination of a date for a hearing and the conclusion of the hearing the creditors may not institute any action against the debtor or apply for the liquidation of the debtor's estate without the permission of the court. Section 118(19) provides for the revocation of the composition by the court in certain circumstances, such as where the debtor has failed to comply with its obligations. Presumably in such circumstances the estate of the debtor may thereafter be liquidated. However, these are details that would need to be specifically considered in the formulation of a new, appropriately devised and worded provision in the applicable insolvency legislation.

137 See the proposed s 74X(16) of the *Magistrates' Courts Act* contained in the *Report on the Review of the Law of Insolvency* (February 2000). See also par 124.1 of the *Explanatory Memorandum to the Draft Insolvency Bill* (February 2000) (SALRC 2000 www.justice.gov.za). The South African Law Reform Commission's report refers to Roestoff and Jacobs 1997 *De Jure* 189.

138 See s 74X(16) of the *Draft Insolvency Bill* (SALRC 2000 www.justice.gov.za).

139 See Boraime and Roestoff 2002 *Int Insolv Rev* 9.

7 Conclusion

Nedbank v Andrews, *FirstRand Bank v Evans* and *FirstRand Bank v Janse van Rensburg* all concerned applications for the sequestration of the estates of debtors who had applied for debt review in terms of the NCA. These judgments follow the precedent established in *Investec v Mutemeri* and *Naidoo v ABSA*, that where a debtor has applied for debt review in terms of the NCA this does not preclude a creditor from applying for the sequestration of that debtor's estate. *Nedbank v Andrews*, *FirstRand Bank v Evans* and *FirstRand Bank v Janse van Rensburg* highlight new aspects of the interaction and interrelationship between the provisions of the NCA and the *Insolvency Act* that need to be addressed and resolved. These cases concerned more specifically the issue of whether an application by a debtor for debt review or a debt re-arrangement order by the magistrate's court in terms of the NCA may constitute the very act of insolvency upon which a creditor seeks to rely in an application for the sequestration of that debtor's estate.

The judgments in *Nedbank v Andrews*, *FirstRand Bank v Evans* and *FirstRand Bank v Janse van Rensburg* reveal a measure of uncertainty regarding the position. In *Nedbank v Andrews* the applicant creditor initially relied on the debtor's application for debt review in terms of the NCA as constituting acts of insolvency in terms of sections 8(e) and 8(g) of the *Insolvency Act*. However, when the matter came before the court, counsel for the applicant withdrew these allegations and based the application solely on an allegation of the respondent's actual insolvency. Thus, remarks made by Nepgen J with regard to the commission of acts of insolvency in this context were *obiter*. In *FirstRand Bank v Evans*, the court regarded the debtor, who had required the creditor in writing to cancel the debit order that he had originally authorised because he had applied for debt review, as having committed an act of insolvency in terms of section 8(g) of the *Insolvency Act*. The respondent claimed that he had been making regular payments in accordance with a court-sanctioned debt restructuring order and he had reduced substantially his indebtedness to the applicant creditor by the transfer to it of the proceeds of the sale of one of the mortgaged properties. However, in spite of this the court was not prepared to exercise its discretion against the issue of a provisional sequestration order. In *FirstRand Bank v Janse van Rensburg*, the court was not prepared to apply

inferential reasoning in the circumstances to find that a credit bureau's report reflecting that the respondent had applied for debt review amounted to an act of insolvency in terms of section 8(g) of the *Insolvency Act*. The court also indicated the existence of qualifications to and, it is submitted, in effect cast doubt on aspects of the reasoning behind the decision in *FirstRand Bank v Evans*. These included the issues of whether an application for debt review *ipso facto* constitutes an act of insolvency in terms of section 8(g) of the *Insolvency Act* and whether precedent concerning applications for administration orders in terms of section 74 of the *Magistrates' Courts Act* are applicable in this context. The decisions leave open the question of whether or not a debtor's application for debt review *ipso facto* constitutes an act of insolvency in terms of section 8(e) of the *Insolvency Act*.

It is submitted that the current position, especially in the light of *FirstRand Bank v Evans*, undermines the potential for the consumer debt relief system introduced by the NCA to serve as an alternative to sequestration. It also potentially encourages the abuse of the process by creditors who may wish to circumvent the NCA's requirements for the enforcement of debts arising out of credit agreements by simply applying for the sequestration of the debtor's estate. It is submitted that this state of affairs and, more particularly, the judgment in *FirstRand Bank v Evans* indicate the need, on a practical level, for solutions to be found in order to combat or at least reduce credit grantors' opposition or resistance to debt review and debt restructuring under the NCA. It is imperative that debt restructuring orders should be viable in that they provide for debtors' obligations to be fulfilled on terms that are reasonable both in respect of instalment amounts and time periods for payment as well as taking into account the original payment terms contracted for and prevailing interest rates.

It has been submitted by a commentator that certain sections of the NCA should be amended in order to clarify the relationship between the NCA and the *Insolvency Act* to preclude the bringing of an application for the sequestration of a debtor's estate once he has applied for debt review and after a debt restructuring order has been issued. This would indeed be a valid consideration. However, it is of great concern that the consumer debt relief system and procedure, including the debt review and debt restructuring processes, provided for by the NCA do not conform to internationally recognised principles and recommendations in relation to

rehabilitation procedures as alternatives to liquidation procedures. For example, according to the "first principle" established in the *INSOL International Consumer Debt Report II*, it is recommended that a debtor should be free to choose between a liquidation procedure and a rehabilitation procedure, the latter including a debt restructuring procedure. Further, on successful completion of such a rehabilitation procedure the debtor should receive a measure of discharge from liability that has been approved by a majority of creditors. In addition, the *INSOL International Consumer Debt Report II* recommends that creditors should be "prohibited from pursuing the debtor during the insolvency process" or "collective mechanism" and it anticipates that the claims of secured and preferent creditors will not be affected.

In the circumstances, it is submitted that legislative intervention is required. It is submitted that consideration should be given to modifying section 118 of the unofficial working draft of a proposed *Insolvency and Business Recovery Bill* which was compiled in 2010, with a view to devising a streamlined system of debt relief accessible via a single insolvency statute. This system should include liquidation and debt restructuring processes variously applicable depending on the circumstances of each case. It should cover not only debt arising out of credit agreements but all types of obligations and it should respect the rights of secured creditors. It is submitted that in this way a more effective balance may be achieved between the interests of debtors and creditors in the consumer debt relief systems and processes available in South Africa.

Bibliography

Bertelsmann, Mars and Nagel *Law of Insolvency*

Bertelsmann E, Mars WH and Nagel C Mars *The Law of Insolvency in South Africa* 9th ed (Juta Cape Town 2008)

Boraine 2003 *De Jure*

Boraine A "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* 217-251

Boraine and Roestoff 1993 *De Jure*

Boraine A and Roestoff M "Vriendskaplike sekwestrasies – 'n produk van verouderde beginsels? (Deel I)" 1993 *De Jure* 229-236

Boraine and Roestoff 1994 *De Jure*

Boraine A and Roestoff M "Vriendskaplike sekwestrasies – 'n produk van verouderde beginsels? (Deel II)" 1994 *De Jure* 31-53

Boraine and Roestoff 2000 *Obiter*

Boraine A and Roestoff M "Developments in American consumer bankruptcy law: lessons for South Africa (Part Two)" 2000 *Obiter* 241-270

Boraine and Roestoff 2002 *Int Insolv Rev*

Boraine A and Roestoff M "Fresh start procedures for consumer debtors in South African bankruptcy law" 2002 *Int Insolv Rev* 1-11

Boraine and Van Heerden 2010 *PELJ*

Boraine A and Van Heerden CM "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments" 2010 *PELJ* 13(3) 83-124

Calitz 2007 *Obiter*

Calitz J "Developments in the United States' consumer bankruptcy law: A South African perspective" 2007 *Obiter* 397-417

Coetzee "Personal bankruptcy and alternative measures"

Coetzee H "Personal bankruptcy and alternative measures - adequate debt relief for over-indebted consumers in South Africa?" (Unpublished paper delivered at the Eighth International Workshop on Commercial Law 3 August 2011 Sandton, Johannesburg)

Evans 2001 *SA Merc LJ*

Evans RG "Friendly sequestrations, the abuse of the process of court, and possible solutions for overburdened debtors" 2001 *SA Merc LJ* 485-508

Evans 2010 *CILSA*

Evans RG "A brief explanation of consumer bankruptcy and aspects of the bankruptcy estate in the United States of America" 2010 *CILSA* 337-351

Evans 2010 *SA Merc LJ*

Evans RG "Law reform in respect of assets in insolvent estates in South Africa" 2010 *SA Merc LJ* 465-483

Evans 2011 *PELJ*

Evans RG "Legislative exclusions or exemptions of property from the insolvent estate" 2011 *PELJ* 14(5) 39-56

Ferriell and Janger *Understanding Bankruptcy*

Ferriell J and Janger JE *Understanding Bankruptcy* 2nd ed (LexisNexis Newark, NJ 2007)

Jones and Buckle *Civil Practice of the Magistrates' Courts*

Jones PST and Buckle HO *The Civil Practice of the Magistrates' Courts in South Africa* 5th ed (Juta Cape Town 1946)

Kupiso 2011 *De Rebus*

Kupiso OB "Can debt enforcement procedures be circumvented by insolvency proceedings?" 2011 *De Rebus* (Nov) 26-27

Maghembe 2011 *PELJ*

Maghembe N "The Appellate Division has spoken – sequestration proceedings do not qualify as proceedings to enforce a credit agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597" 2011 *PELJ* 14(2) 171-226

McKenzie Skene 2005 *Int Insolv Rev*

McKenzie Skene DW "Forgiving our debtors: a Scottish perspective on a fresh start for debtors" 2005 *Int Insolv Rev* 1-26

McKenzie Skene 2010 *Int Insolv Rev*

McKenzie Skene DW "The composition of the debtor's estate on insolvency: A comparative study of exemptions" 2010 *Int Insolv Rev* 29-55

Meskin *Insolvency Law*

Meskin PM *et al Insolvency Law* (Butterworths Durban 1990-)

Otto and Otto *National Credit Act Explained*

Otto JM and Otto RL *The National Credit Act Explained* 2nd ed (LexisNexis Durban 2010)

Roestoff *et al* 2009 *PELJ*

Roestoff M *et al* "The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005" 2009 *PELJ* 12(4) 247-306

Roestoff and Jacobs 1997 *De Jure*

Roestoff M and Jacobs L "Statutêre akkoord voor likwidasie: 'n toereikende skuldenaarremedie?" 1997 *De Jure* 189-212

Roestoff and Renke 2005 *Obiter*

Roestoff M and Renke S "Debt relief for consumers – the interaction between insolvency and consumer protection legislation (Part One)" 2005 *Obiter* 561-574

Roestoff and Renke 2006 *Obiter*

Roestoff M and Renke S "Debt relief for consumers – the interaction between insolvency and consumer protection legislation (Part Two)" 2006 *Obiter* 98-110

Steyn *Statutory Regulation*

Steyn L *Statutory Regulation of Forced Sale of the Home in South Africa*. LLD – thesis UP 2012)

Van Apeldoorn 2008 *Int Insolv Rev*

Van Apeldoorn JC "The 'Fresh Start' for individual debtors: Social, moral and practical issues" 2008 *Int Insolv Rev* 57-72

Van Heerden "The interaction between debt review"

Van Heerden C "The interaction between debt review in terms of the National Credit Act 34 of 2005 and insolvency law" in University of Johannesburg *Annual Banking Law Update* 23 April 2009 University of Johannesburg

Van Heerden and Boraine 2009 *PELJ*

Van Heerden C and Boraine A "The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law" 2009 *PELJ* 12(3) 22-63

Register of reports and draft Bills

Department of Justice and Constitutional Development *Unofficial working draft*

Unofficial working draft of a proposed Insolvency and Business Recovery Bill (compiled in 2010); available from Mr MB (Tienie) Cronje (mcronje@justice.gov.za) at the Department of Justice and Constitutional Development, Pretoria, South Africa

INSOL *International Consumer Debt Report*

INSOL *International Consumer Debt Report* (INSOL London 2001)

INSOL *International Consumer Debt Report II*

INSOL International Consumer Debt Report II (INSOL London 2011)**Register of legislation and regulations**

Insolvency Act 24 of 1936

Magistrates' Courts Act 32 of 1944

National Credit Act 34 of 2005

Regulations to the NCA in GNR 489 in GG 28864 of 31 May 2006

Register of case law

Barlows (Eastern Province) Ltd v Bouwer 1950 4 SA 385 (E)

Chenille Industries v Vorster 1953 2 SA 691 (O)

Collett v FirstRand Bank Ltd 2011 4 SA 508 (SCA)

Court v Standard Bank of South Africa Ltd 1995 3 SA 123 (A)

De Waard v Andrew & Thienhaus Limited 1907 TS 727

Du Plessis v Tzerefos 1979 4 SA 819 (O)

Eli Spilkin (Pty) Ltd v Mather 1970 4 SA 22 (E)

Ex parte Ford and Two Similar Cases 2009 3 SA 376 (WCC)

FirstRand Bank Ltd v Evans 2011 4 SA 597 (KZD)

FirstRand Bank Ltd v Janse van Rensburg 2012 2 All SA 186 (ECP)

Investec Bank Ltd v Mutemeri 2010 1 SA 265 (GSJ)

Madari v Cassim 1950 2 SA 35 (D)

Naidoo v ABSA Bank Ltd 2010 4 SA 597 (SCA)

Nedbank v Andrews (240/2011) 2011 ZAECPEHC 29 (10 May 2011)

Ohlsson's Cape Breweries Ltd v Totten 1911 TPD 48

Optima Fertilizers (Pty) Ltd v Turner 1968 4 SA 29 (D)

Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz 1940 NPD 163

Rodrew (Pty) Ltd v Rossouw 1975 3 SA 137 (O)

Shaban & Co (Pty) Ltd v Plank 1966 1 SA 59 (O)

Standard Bank of South Africa Ltd v Court 1993 3 SA 286 (C)

Weiner v Broekhuysen 2003 4 SA 301 (SCA)

Register of internet sources

SALRC 2000 www.justice.gov.za

South African Law Reform Commission 2000 Report on the Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum (Project 63) www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf [date of use 10 Feb 2012]

List of abbreviations

CILSA	Comparative & International Law Journal of Southern Africa
Int Insolv Rev	International Insolvency Review
NCA	<i>National Credit Act</i> 34 of 2005
NCR	<i>National Credit Regulation</i> (in relation to the prescribed forms contained in the regulations to the NCA)
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALRC	South African Law Reform Commission